IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 2000 Session

STATE OF TENNESSEE v. RAY ANTHONY USSERY

Direct Appeal from the Circuit Court for Marshall County
No. 14052, Charles Lee, Trial Judge

No. M2000-00194-CCA-R3-CD-Filed September 22, 2000

The appellant, Ray Anthony Ussery, was convicted by a jury of two counts of the sale of cocaine and one count of delivery and was sentenced to nine years in the Tennessee Department of Correction. On appeal, he argues (1) that the evidence presented at trial was insufficient to support a verdict beyond a reasonable doubt; and (2) that the nine year sentence imposed is excessive. Upon review, this Court finds no error on the part of the trial court and affirms the appellant's conviction and sentence.

Tenn. R. App. P. 3; Judgment of the Circuit Court is affirmed.

DAVID G. HAYES, J., delivered the opinion of the court, in which THOMAS T. WOODALL, J. and NORMA MCGEE OGLE, J., joined.

Hershell D. Koger, Pulaski, Tennessee, attorney for appellant, Ray Anthony Ussery.

Paul G. Summers, Attorney General and Reporter, Michael Moore, Solicitor General, David H. Findley, Assistant Attorney General, William Michael McCown, District Attorney General, and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The appellant, Ray Anthony Ussery, was charged with two counts of sale of cocaine and three counts of delivery of cocaine, as follows:

Count 1	12/8/98 sale of cocaine base, a class B felony
Count 2	12/8/98 delivery of cocaine base, a class B felony
Count 3	12/8/98 sale of cocaine base, a class C felony
Count 4	12/8/98 delivery of cocaine base, a class C felony
Count 5	12/10/98 delivery of cocaine, a class C felony

A Marshall County Circuit Court jury found the appellant guilty on all counts and the trial court sentenced him to nine years in the custody of the Tennessee Department of Correction.[1] In this direct appeal, he argues (1) that the evidence presented at trial was insufficient to support a verdict beyond a reasonable doubt; and (2) that the nine year sentence imposed is excessive in length. Upon review, we find the appellant's arguments to be without merit and affirm the decision of the Marshall County Circuit Court.

Background

Agent Thomas Biele, of the 17th Judicial District Drug and Violent Crime Task Force, received information from the landlord of a trailer park in Lewisburg, Tennessee, that possible drug deals were taking place on the premises. Thereafter, a confidential informant, who had worked for the Task Force on prior occasions, was placed in the trailer park. On December 8, 1998, the confidential informant contacted Biele about a potential drug sale. Biele, accompanied by Agent Kris Lewallen, went to the trailer park shortly after 10:00 p.m. and met with the confidential informant. Thereafter, the confidential informant introduced the agents to the appellant who produced "four little pieces of aluminum foil" which contained crack cocaine. Biele gave the appellant $120 for the four packets. The appellant then told Biele and Lewallen that he could get a "good $40 rock" if they were willing to wait 20 minutes. They agreed and the appellant left the trailer. In approximately 20 minutes, the appellant returned and sold the crack cocaine to Lewallen for $40.

On December 10, 1998, Biele and Lewallen again went to the trailer park. This time, however, the appellant requested that Biele "front" the money prior to receiving the cocaine. Biele gave the appellant $100 and watched as the appellant "jogged" over to a nearby residence. The appellant returned with the cocaine and gave it to Biele.

The substances purchased by Biele and Lewallen were tested by Donna Flowers, a forensic chemist for the Tennessee Bureau of Investigation, and ascertained to be crack cocaine. She determined that the cocaine purchased by Biele on December 8, 1998, weighed .57 grams and that the cocaine purchased by Lewallen weighed .2 grams. Additionally, Flowers determined that the cocaine purchased by Biele on December 10, 1998, weighed .4 grams.

I. Sufficiency of the Evidence

The appellant asserts that the evidence was insufficient as a matter of law to support the jury's verdict of guilty beyond a reasonable doubt and that his convictions should be set aside. The appellant provides the following arguments in support of his position: (1) that the identification of

[1] At sentencing, the trial judge merged count one with count two and sentenced the appellant to nine years in the custody of the Tennessee Department of Correction. Likewise, the trial judge merged count four with count three and sentenced the appellant to four years on count three. The appellant also received a four year sentence on count five. All sentences were to run concurrently for an effective nine year sentence.

appellant was only for a relatively short period of time; (2) that the name was spelled incorrectly on the envelope containing the drugs; and (3) that the 35 mm container used to transport the cocaine from each transaction was "never washed out."

The relevant question upon a sufficiency review of a criminal conviction, be it at the appellate or trial level, is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). See also Tenn. R. App. P. 13(e). Jackson v. Virginia addresses two important aspects of a sufficiency review; (1) the manner of review of the convicting evidence and (2) the standard of review for legal sufficiency. The scope of our examination of the evidence is not equivalent to that of the jury's. In a challenge to the sufficiency of the evidence, this court does not retry the defendant. We emphasize that our examination in a sufficiency review is not to revisit the inconsistent, contradicting, implausible or non credible proof, as those issues are resolved by the jury. Rather, we look to the record to determine whether there was substantive probative evidence to support the verdict. The second inquiry, the question of legal sufficiency, then follows: whether the record contains evidence from which the jury could have found the essential elements of the crime beyond a reasonable doubt. A jury verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Corey Lamont Radley, No. 01C01-9803-CR-00113 (Tenn. Crim. App. at Nashville, Jul. 13, 1999), perm. to appeal denied, (Tenn. Dec. 27, 1999)(*for publication*); *See also* State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). On appeal, the state is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn therefrom. Id. Every reasonable hypothesis of innocence need not be dispelled; it is only necessary that there exists proof which supports the elements of the crime. Accordingly, it is the appellate court's duty to affirm the conviction if the evidence, viewed under these standards, was sufficient for any rational trier of fact to have found the essential elements of the offense beyond a reasonable doubt.

In the present case, the evidence was sufficient to support the verdict. The appellant first contends that the "Agents' purported knowledge of Appellant was minimal". The record, however, does not support this contention. First, Biele purchased cocaine from the appellant on two separate occasions. On both occasions, Biele was around the appellant for several minutes, in lighted conditions, thereby giving Biele ample opportunity to become familiar with the appellant. Second, Biele identified the appellant at trial, indicating that there was no question in his mind that the appellant was the same person who sold him the narcotics in December of 1998.

The appellant next contends that since his name was spelled incorrectly on the envelope containing the drugs that the evidence was insufficient to support a guilty conviction. We reject this argument. The name "Raymond Usser" was marked on the envelope. The appellant's name is "Ray Ussery." The identity question is a jury-question. The jury heard the testimony concerning the misspelling of the appellant's name on the envelope. This Court may not "re-weigh or re-evaluate the evidence" in the record below. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992)(citing State

v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). Furthermore, Biele identified the appellant as the person who sold him the crack cocaine. Accordingly, this issue has no merit.

Finally, the appellant argues that the evidence was insufficient to support a jury conviction beyond a reasonable doubt because Biele did not "wash out" the 35 mm container he carried the crack rocks in after purchases. Once again, we reject his argument. Biele testified that the container was empty each time he put the rocks in the container and that the rocks were in solid form. Accordingly, the evidence produced at trial supported the verdict.

In the present case, the proof established that the appellant knowingly sold crack cocaine to Biele and Lewallen on two occasions and delivered cocaine on another occasion. *See* Tenn. Code Ann. § 39-17-417(2) & (3). The evidence presented at trial, taken in the light most favorable to the State, is such that a reasonable juror could have found the appellant guilty beyond a reasonable doubt. Therefore, this issue is without merit.

II. Length of Sentence

The appellant contends that the trial court's imposition of a nine year sentence was improper in this case. Specifically, the appellant argues that the trial court "failed to properly apply the mitigating factor presented by appellant, namely that appellant's conduct neither caused, nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1). We disagree with appellant's argument and find this issue to also be without merit.

When an appellate court reviews the length, range or manner of service of a sentence imposed by the sentencing court, it must conduct a de novo review of the sentence, with a presumption that the determinations from the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). If appellate review reflects that the trial court, by following the statutory sentencing procedure, imposed a lawful sentence, after having given due consideration and proper weight to the factors and principles which are relevant to sentencing under the Act, and that the trial court's findings of fact upon which the sentence is based are adequately supported in the record, then we may not disturb the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (1991). The burden is on the appellant to show that the sentence imposed was improper. State v. Fletcher, 805 S.W.2d at 786.

In the present case, the court considered two enhancement factors, namely: (1) that the appellant had a previous history of convictions or criminal behavior in addition to those necessary to establish the appropriate range; and (2) that the appellant had a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. Tenn. Code Ann. § 40-35-114(1) & (8). The appellant's criminal history reflects eleven prior misdemeanor convictions. Such past criminal behavior adequately supports enhancement factor (1) above. Enhancement (8) is also supported by the record. In 1993, the appellant violated a term of his probation. Accordingly, the trial court did not err in applying the enhancement factors.

The appellant argues, however, that the trial court erred by not considering mitigation factor (1), that the appellant's conduct neither caused nor threatened serious bodily injury. We disagree. Inherent within the trafficking and distribution of drugs is the potential for serious bodily injury. Although we recognize that not all drug deals involve violence, we do, however, recognize that the very nature of the act makes the potential for serious bodily injury ever present. Accordingly, we find that the sale of cocaine is not so sufficiently free from all danger such that it can be used to mitigate a seller's sentence. State v. Vanderford, 980 S.W.2d 390, 407 (Tenn.Crim.App. 1997); *See also* State v. Keel, 882 S.W.2d 410, 422 (Tenn.Crim.App. 1994). Therefore, we conclude that the trial court did not err by not applying mitigation factor (1) to the appellant's sentences.

CONCLUSION

The evidence presented at trial was sufficient to support a guilty verdict beyond a reasonable doubt. Furthermore, the sentence imposed by the trial court was not excessive as to length. Accordingly, the judgment of the Marshall County Circuit Court is affirmed.

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DAVID G. HAYES, JUDGE